IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-6453

JONEY JOE LUSTY,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

BRIEF OPPOSING CERTIORARI

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	)	
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BRIEF OPPOSING CERTIORARI

STATEMENT OF THE CASE

Jone Joe Lusty, hereinafter referred to as petitioner, was convicted of Murder in the First Degree. His sentence of death was affirmed on appeal to the Oklahoma Court of Criminal Appeals, reported below as Lusty v. State, Okl. Cr., 542 P.2d 545 (1975).

Mandate was stayed below pending resolution of related issues raised in the Petition for Rehearing in Williams and Justus v. State, Okl. Cr., 542 P.2d 554 (1975) and oral argument was presented upon consolidated hearing. Thereafter, petitioner's judgment and sentence was reaffirmed for reasons stated in the Opinion on Rehearing in the leading case, Williams and Justus v. State, supra, at page 591.

REASONS FOR NOT GRANTING WRIT

Invalidation of 21 O.S. Supp. 1974, §§701.5, 701.6 by Oklahoma Court of Criminal Appeals raises no constitutional issue where, as here, petitioner is not within the class addressed by stricken statutes. Invalidation thereof is not within the ex post facto proscription of Article I, §10 of the United States Constitution, nor deprives petitioner of any constitutional right.

Oklahoma's mandatory scheme of capital punishment does not permit infliction of the death penalty contra to Furman v. Georgia, 408 U.S. 238 (1972), nor is death sentence imposed otherwise cruel and unusual punishment within the meaning of the Eighth and Fourteenth Amendment of the United States Constitution.

Petitioner's rights under the Sixth and Fourteenth Amendments to the United States Constitution were not violated by Court authorized separation of juror.

ARGUMENT AND AUTHORITIES

I.

INVALIDATION OF 21 O.S. SUPP. 1974, §§701.5, 701.6 BY OKLAHOMA COURT OF CRIMINAL APPEALS RAISES NO CONSTITUTIONAL ISSUE WHERE, AS HERE, PETITIONER IS NOT WITHIN THE CLASS ADDRESSED BY STRICKEN STATUTES; INVALIDATION THEREOF IS NOT WITHIN CONSTITUTIONAL EX POST FACTO PROSCRIPTION OF ARTICLE I, §10 OF THE UNITED STATES CONSTITUTION, NOR OTHERWISE DEPRIVE PETITIONER OF ANY CONSTITUTIONAL RIGHT.

Petitioner's contention is based upon the invalidation of 21 O.S. Supp. 1974, §§701.5, 701.6[1], which he claims[2] deprived him of the opportunity for an evidentiary hearing contemplated therein, thereby negating the possibility of a reduced sentence.

As stated in Section 701.5, the purpose of the evidentiary hearing was to determine if the sentence of death comports with the principles of due process and equal protection of the law. The evidentiary hearing contemplated therein was duplicitous, as recognized by the State Appellate Court.[3]

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1. Quoted verbatim, petitioner's brief, page 5.

2. Petitioner's brief, Appendix B, page 14.

3. Opinion on Rehearing, Williams and Justus v. State, Okl. Cr., 542 P.2d 591, at page 594.

Petitioner has never contended that his sentence was a result of any factor listed within the stricken statutes, although expressly invited to do so during oral argument below.[4] Certainly, any factor or evidence regarding such constitutional protections as due process and equal protection could have been presented to the trial court and reviewed on appeal, notwithstanding the stricken statutes. At this late date, petitioner has yet to make such claim, presumably because he is not among the class of persons within the purported ambit of the stricken provisions.[5]

Petitioner's claim that the instant case is squarely controlled by a prior decision of this Court,[6] misconstrues the holding therein. In the cited case, the penalty for Grand Larceny at the time of the offense was "for not more than 15 years." The Legislature changed the law after the commission of the crime, but before sentencing, making the 15 year sentence mandatory. This Court held the new law was ex post facto because the legislative change occurred after the crime was committed.

In the instant case, the mandatory penalty of death under 21 O.S. Supp. 1974, §701.3 was in effect at the time of the offense and during the time the petitioner was charged, tried, convicted and sentenced to death. Subsequently, the State appellate court held the provisions of 21 O.S. Supp. 1974, §§701.5, 701.6 unconstitutional. Those provisions purportedly authorized the appellate court to modify the death sentence only if such death sentence was found to have been a result of specified factors therein which resulted in denial of due process or equal protection of the law.

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4. 542 P.2d at page 550.

5. In Williams and Justus v. State, Okl. Cr., 542 P.2d at page 597, the State court specifically found that appellants there were not within the class of persons contemplated within the stricken statutes.

6. Lindsey v. Washington, 301 U.S. 397, 57 S.Ct. 797, 81 L.Ed. 1182 (1937), petitioner's brief, Appendix B, page 18.

Petitioner has made no claim at any time, during trial, on appeal, or in his petition for certiorari, that his death sentence was affected by any factor within the stricken provisions.

This Court has never held that the purpose of the ex post facto clause was to serve as a restraint upon the judiciary, but has, in fact, held contra in Ross v. Oregon, 227 U.S. 150, 33 S.Ct. 220, 57 L.Ed. 458 (1913); Frank v. Mangum, 237 U.S. 309, 35 S.Ct. 582, 59 L.Ed. 969 (1915); and United States v. Rundle, 383 F.2d 421 (3rd Cir. 1967), cert. denied, 393 U.S. 863, 89 S.Ct. 144, 21 L.Ed.2d 131. The provision was intended to secure substantial personal rights against arbitrary and oppressive legislation. See Malloy v. South Carolina, 237 U.S. 180, 35 S.Ct. 507, 59 L.Ed. 905 (1915). Respondent is fortified in this position by the history of the ex post facto clause. See, e.g., Ex Post Facto in the Constitution, 20 Michigan Law Review 315 (1921) and The True Meaning of the Constitutional Prohibition of Ex Post Facto Laws, 14 University of Chicago Law Review 539 (1947).

Although the due process clause is admittedly a brother to the ex post facto provision, there exists a danger in treating them alike. See separate opinion by Justices Harlan and Frankfurter in James v. United States, 366 U.S. 213, 247, 6 L.Ed.2d 246, 269, 81 S.Ct. 1052 (1961). In Bouie v. Columbia, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964), this Court considered ex post facto rationale in deciding a due process question. There, this Court held that the State appellate court had enlarged the meaning of the statute and the defendants were thereby denied due process question. There, this Court held that the State appellate court had enlarged the meaning of the statute and the defendants were thereby denied due process because they

had no notice that their actions constituted a criminal offense at the time of their acts. This decision is nowhere analogous to the instant case. Other cases cited by petitioner are likewise distinguishable.

II.

OKLAHOMA'S SCHEME OF MANDATORY CAPITAL PUNISHMENT DOES NOT PERMIT INFLICTION OF THE DEATH PENALTY CONTRA TO FURMAN V. GEORGIA, 408 U.S. 238 (1972), NOR IS THE DEATH SENTENCE IMPOSED UPON PETITIONER OTHERWISE CRUEL AND UNUSUAL PUNISHMENT WITHIN THE MEANING OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

Generally, petitioner cites a number of cases antedating current capital punishment statutes with the inference that the former affects the latter. However, Oklahoma's procedure was significantly changed by the enactment of current capital punishment legislation and respondent submits that no State in the Union has exceeded Oklahoma in curbing arbitrary discretion.

PROSECUTORIAL DISCRETION

To say that the prosecutor has no discretion in determining the charge to be filed would be inaccurate, because admittedly he does. No system has yet been devised, if indeed such a system is possible, to ensure that the prosecutor uses correct judgment in the selection of the charge to be filed. However, this is not to say that the prosecutor has unlimited discretion. Petitioner recognizes that once a charge is filed, any action relating to the disposition thereof requires court approval.[7] Oklahoma procedure also requires the examining magistrate at a preliminary

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7. Petitioner's brief, Appendix B, page 22.

hearing to direct the accused to be held for trial on a charge which the evidence reflects, nor necessarily the crime charged.[8]

Further, in response to Furman, the Oklahoma Court of Criminal Appeals has held that once the accused has been arraigned for a capital offense, the State cannot simply enter into a plea bargain agreement. The State must establish by competent evidence that the accused committed the lesser offense and is not guilty of Murder in the First Degree as a predicate for the District Court to approve a reduction of the charge. State ex rel. Young v. Warren, Okl. Cr., 536 P.2d 965 (1975).

JURY DISCRETION

Oklahoma requires assessment of the death penalty upon the conviction of Murder in the First Degree, 21 O.S. Supp. 1974, §701.3. Petitioner stresses that Oklahoma procedure also provides for instructing the jury regarding a lesser included offense,[9] but only where warranted by the evidence. Surely petitioner does not suggest such instruction should not be given irrespective of the evidence, for such procedure most certainly would be fundamentally unfair to any

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8. 22 O.S. 1971, §264, provides:

> "Defendant held to answer.
>
> "If, however, it appears from the examination that any public offense has been committed, and that there is sufficient cause to believe the defendant guilty thereof, the magistrate must in like manner indorse on the complaint an order signed by him to the following effect:
>
> "It appearing to be that the offense named in the within complaint mentioned (or any other offenses, according to the fact, stating generally nature thereof), has been committed, and that there is sufficient cause to believe the within named A. B. guilty thereof, I order that he be held to answer the same."

9. Petitioner's brief, Appendix B, pages 29-36.

accused. Petitioner's argument in this regard inherently calls for condemnation of jury determination in capital cases and necessarily presents a separate and distinct approach regarding the constitutionality of the death penalty itself. If this Court should adopt petitioner's concept, then our present system of criminal jurisprudence must necessarily be dismantled, for the traditional role of a juror to judge the credibility of witnesses, weigh the evidence and be a trier of fact, is inextricably woven into our system of justice.

Delaware is the only jurisdiction respondent notes to seemingly accept the view that prohibitive discretion remains where the judge or jury trying the case may find the accused guilty of a lesser included offense, State v. Sheppard, Del.Sup., 331 A.2d 142 (1975) citing dictum from State v. Dickerson, Del. Sup., 298 A.2d 761, 769-770 (1972). Other jurisdictions do not accept this view, e.g., State v. Selman, La., 300 So.2d 467 (1974); State v. Dixon, Fla., 283 So.2d 1 (1973); Coley v. State, 231 Ga. 829, 204 S.E.2d 612 (1974); Jurek v. State, Tex.Crim.App., 522 S.W.2d 934 (1975).

EXECUTIVE CLEMENCY

Oklahoma has held the possibility of executive clemency under Article VI, §10 of the Oklahoma Constitution not to be repugnant to either the State or Federal Constitutions, Williams and Justus v. State, supra.

In the post-Furman case of Shick v. Reed, 419 U.S. 256, 95 S.Ct. 379, 42 L.Ed.2d 430 (1974), this Court recognized that the very essence of the pardoning power is to treat each case individually and that individual acts of clemency inherently call for discriminating choices, because no two cases are the same.

III.

PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS WERE NOT VIOLATED BY COURT AUTHORIZED SEPARATION OF JUROR.

As the Oklahoma Court of Criminal Appeals noted, 542 P.2d at page 549, a lone juror was separated from other jurors before submission of the case because her home had been burglarized. The police needed a statement concerning any property that might be missing and the juror's husband was out of town. All parties to the case, including a bailiff, accompanied the lone juror to her home while the remainder of the jury was kept in custody of the regular bailiff. The State Court also noted that she was not prejudiced against petitioner as a result of these circumstances.

Respondent submits the procedure used was not a denial of petitioner's right to an impartial jury and his argument is based upon pure speculation. He has cited no case analogous to the factual situation in the instant case.

The trial court is vested with discretion in permitting the jury to separate before the case is submitted, 22 O.S. 1971, §853, but petitioner's brief, at page 15, suggests the trial court should have taken the convenient, prudent alternative of seating the alternate juror. However, the seating of an alternate juror is governed by 22 O.S. 1971, §601(a), which authorizes seating only in case of illness or death of a regular juror. Thus, on appeal to the State court, the petitioner could have claimed error had the trial court seated the alternate juror.

CONCLUSION

Therefore, premises considered, it is respectfully

submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF MAILING

This is to certify that I mailed a copy of the instrument to which this certification is attached to the following named counsel of record, this 23rd day of April, 1976:

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